

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 20, 2002 Session

JAMES HAYWOOD HILL v. NAOMI WEBB HILL

Appeal from the Circuit Court for Davidson County
No. 99D-2273 Muriel Robinson, Judge

No. M2001-01016-COA-R3-CV - Filed December 23, 2002

Husband filed for divorce from Wife on the basis of inappropriate marital conduct. The trial court declared the parties divorced pursuant to Tenn. Code Ann. § 36-4-129, divided the marital assets, and awarded alimony to Wife. Husband appealed, arguing that the trial court should have granted him the divorce and that the trial court erred in ordering Husband to pay \$500 per month alimony in futuro to Wife. Because the trial court need not find both parties at fault in order to declare a divorce pursuant to Tenn. Code Ann. § 36-4-129 and because the trial court's award of \$500 per month in alimony does not reflect an improper application of the law and is not unreasonable, we affirm the decision of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed and Remanded

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S., and JOHN BROWN HAGLER, SP. J., joined.

Jacqueline B. Dixon, Nashville, Tennessee, for the appellant, James H. Hill.

Edward J. Gross, Nashville, Tennessee, for the appellee, Naomi Webb Hill.

OPINION

The parties herein were married on August 7, 1964. They separated thirty-five (35) years later on July 12, 1999, and Mr. Hill filed for divorce shortly thereafter. At the time of the trial, Mrs. Hill was 67 years old, and Mr. Hill was 65.

At the time the parties were married, Mrs. Hill was the mother of a young child, Jackie, who was about seven. After the marriage, Mr. Hill adopted Jackie. During the marriage Mr. Hill worked for the National Elevator Company until he retired in January of 1999. Mrs. Hill worked for some period of time during the marriage, but resigned when she had a stroke. Later, Mrs. Hill suffered other health problems and was more recently diagnosed with dementia. Mr. Hill retired due to health

problems, including open heart surgery, but testified that before his heart problems he had considered retiring in order to take care of his wife.

Jackie¹ has been a problem in the relationship intermittently for many years, and arguments with and about her were not uncommon. She was 43 years old at the time of the trial and had lived with her parents the entire time except for brief periods totaling about two years. During the marriage, Jackie was hospitalized multiple times for both physical and mental problems. Mr. Hill, or his insurance, paid for each of these hospitalizations. Most recently, Jackie moved back into the Hill home from her residence in Florida after her third divorce. Mr. Hill paid for Jackie's moving expenses. Jackie did not work and, at the time of trial, had been on social security for eight (8) to ten (10) years. Shortly after Jackie moved in there was an argument between her and Mr. Hill. Jackie called the police and said that Mr. Hill assaulted her. Mr. Hill was arrested and taken to jail for a few hours. This arrest occurred in July of 1999 and was the triggering event for the couple's separation and these proceedings. The charges of assault were later dropped and expunged from Mr. Hill's record.

After his arrest, Mr. Hill did not return to the marital home. He phoned Mrs. Hill and told her that he would move back in and care for Mrs. Hill and support the household on the condition that Jackie move out of the house. Mrs. Hill refused to ask Jackie to move, and Mr. Hill filed for divorce based on inappropriate marital conduct.² At the divorce hearing, Mrs. Hill testified that Jackie helped to care for her and that "she's been at the house, because I would not pitch her out on the street." Mrs. Hill testified that she believed that Mr. Hill contributed to the problem as much as Jackie did.

The court declared the parties divorced pursuant to Tenn. Code Ann. § 36-4-129 and divided the assets and income. The court ordered that the marital home be sold and the proceeds split evenly between the parties. Further, the court ordered that Mr. Hill's pension be split evenly between Mr. and Mrs. Hill and divided other property including accounts. Mr. Hill was awarded, as his separate property, two bank accounts that contained money he previously inherited, and Mrs. Hill was awarded her life insurance policy. In addition, the court awarded Mrs. Hill \$500 per month in alimony in futuro.

Mr. Hill appeals the ruling declaring the parties divorced pursuant to Tenn. Code Ann. § 36-4-129, rather than finding that he was entitled to a divorce. In addition, he appeals the award of alimony.

¹Jackie was subpoenaed for the divorce hearing, but Mr. Hill and his attorney were unable to find her to serve her. Therefore, she was not present at the hearing nor did she testify.

²Mr. Hill testified his decision to go ahead and file came after Mrs. Hill withdrew money from their joint account. He was concerned about her ability to manage financial matters.

I. Grant of Divorce Pursuant to Tenn. Code Ann. § 36-4-129(b)

Mr. Hill argues that the trial court erred in declaring the parties divorced pursuant to Tenn. Code Ann. § 36-4-129(b), rather than granting Mr. Hill the divorce from Mrs. Hill based on her inappropriate marital conduct in refusing to make the couple's adult daughter move out of the parties' home. Mr. Hill states that "the evidence preponderates against the trial judge's implied conclusion that both parties contributed to the breakup of the marriage." To support his claim that he should have been awarded the divorce, Mr. Hill relies on comments made by the trial judge during the proceedings, that he claims show the trial court "clearly felt that the reason for the 'break up' of the parties' marriage was the adult daughter."

Conversely, Mrs. Hill's brief states that the trial court's decision to declare the parties to be divorced under Tenn. Code Ann. § 36-4-129(b) was the "wise, insightful and least painful alternative to an assessment of blame on the part of either party." Mrs. Hill states that Mr. Hill's sole complaint about her was "her support of the parties' (43) forty-three-year-old adult dependent daughter." Mrs. Hill stated that it was Mr. Hill who abandoned the marriage, and the trial court was correct in exercising its discretion to declare the parties divorced pursuant to Tenn. Code Ann. § 36-4-129(b), rather than awarding the divorce to Mr. Hill.

Tenn. Code Ann. § 36-4-129(b) provides:

The court may, upon stipulation to or proof of any ground for divorce pursuant to § 36-4-101, grant a divorce to the party who was less at fault, or if either or both parties are entitled to a divorce, declare the parties to be divorced, rather than awarding a divorce to either party alone.

In *Varley v. Varley*, 934 S.W.2d 659, 665 (Tenn. Ct. App. 1996), this court held that Tenn. Code Ann. § 36-4-129(b) permitted the trial court to grant a divorce to the party who was less at fault or, if either or both parties are entitled to be divorced, declare the parties to be divorced, rather than awarding a divorce to either party alone. It found that "[a]lthough the statute allows for the awarding of the divorce to the party 'less at fault,' there is certainly no requirement of a written finding by the trial court that both parties were at fault or which party was less at fault." *Varley*, 934 S.W.2d at 665.

We note that in the Final Decree of Divorce the trial court did not, and was not required to, make a written statement declaring whether it found one or both parties at fault for the break up of the marriage. Instead, the decree states that "The parties are hereby declared divorced pursuant to T.C.A. § 36-4-129." During the proceedings, however, the trial judge stated that:

I'm convinced that these parties would still be together if this adult child wasn't still in the home at age 43. That has been the problem. I can understand, her [Mrs. Hill's] position is whether they are 4 or 43, they are still your baby. I can understand

his [Mr. Hill's] position, too, because it's not easy to have adult children at home . . . I'm going to declare the parties divorced pursuant to T.C.A. § 36-4-129.

Where the evidence shows that both parties engaged in inappropriate marital conduct or other conduct constituting grounds for divorce, the courts may declare them divorced. *Fulbright v. Fulbright*, 64 S.W.3d 359, 364 (Tenn. Ct. App. 2001); *Earls v. Earls*, 42 S.W.3d 877, 884 (Tenn. Ct. App. 2000). The trial court's statements from the bench indicate a finding that both parties were somewhat at fault in the breakup of the marriage. We interpret this as an implicit finding that both had engaged in inappropriate marital conduct and each was entitled to a divorce. The evidence does not preponderate against that finding, and we find no error in the court's decision to declare the parties divorced. *Fulbright*, 64 S.W.3d at 364.

Even if the evidence supported a finding that only one party was guilty of inappropriate marital conduct, the court still had authority to declare the parties divorced. Tenn. Code Ann. § 36-4-129(b) clearly states that if either party is entitled to a divorce, the court can declare the parties divorced. Thus, proof of grounds by either party authorizes the court to declare the parties divorced instead of awarding the divorce to one of the parties. *Van Horn v. Van Horn*, No. E2001-00519-COA-R3-CV, 2002 Tenn. App. LEXIS 524, at *12 (Tenn. Ct. App. July 24, 2002) (no Tenn. R. App. P. 11 application filed). As this court has stated:

Tenn. Code Ann. § 36-4-129(b) permits a trial court to declare the parties divorced not only when both parties have proved that they have grounds for divorce, but also when only one party has proved grounds for divorce. By its own terms, the statute empowers a court "to grant a divorce to the party who was less at fault or if either or both parties are entitled to a divorce, declare the parties divorced, rather than awarding the divorce to either party alone." Tenn. Code Ann. § 36-4-129(b) does not require the trial court to weigh the relative degrees of fault or to grant the divorce to the party who, in the court's mind, is less at fault. *Wilson v. Wilson*, 987 S.W.2d 555, 558 (Tenn. Ct. App. 1998) (declaring the parties divorced despite a finding that the wife was more at fault); *Varley v. Varley*, 934 S.W.2d 659, 665 (Tenn. Ct. App. 1996) (holding that the trial court is not required to make written findings regarding relative degrees of fault).

Pate v. Pate, No. M1998-00947-COA-R3-CV, 2001 Tenn. App. LEXIS 632, at *13 (Tenn. Ct. App. Aug. 27, 2001) (no Tenn. R. App. P. 11 application filed).

Thus, it is clear that the trial court need not find both parties to be at fault in order to declare the parties divorced under Tenn. Code Ann. § 36-4-129(b). If the trial court finds either party has established grounds for divorce, the court has the discretion to declare the parties divorced rather than to grant either party, even a party without fault, the divorce. Thus, to reach its decision, it was not necessary for the trial court to find, as Mr. Hill asserts, that both he and Mrs. Hill were at fault. Even if the court found only Mrs. Hill to be at fault, the trial court was not required to grant Mr. Hill the divorce.

We affirm the trial court's decision to declare Mr. and Mrs. Hill divorced pursuant to Tenn. Code Ann. § 36-4-129(b).

II. Spousal Support

After dividing the parties' property, the trial court awarded Mrs. Hill alimony in futuro in the amount of \$500 per month until her death or remarriage. While recognizing the discretion afforded the trial court in such matters, Mr. Hill objects to the alimony award because alimony should be awarded in such a way that the spouses approach equity, and, he asserts, his income will be lower than Mrs. Hill's under the award. He also asserts that the alimony awarded, in conjunction with her other income, exceeded Mrs. Hill's need, as evidenced by her expense statement, and questioned some of the expenses she claimed.

When granting a divorce, a court may grant an order for the payment of spousal support on a long term basis or until the death or remarriage of the recipient spouse if there is relative economic disadvantage between the spouses and rehabilitation is not feasible. Tenn. Code Ann. § 36-5-101(d)(1). Mr. Hill acknowledges that rehabilitation of Mrs. Hill is not feasible. In addition to these threshold requirements, in determining whether to award support and the nature, amount and length of such support, the court is to consider all relevant factors, including those enumerated in the statute. Tenn. Code Ann. § 36-5-101(d)(1).³

³The factors the court must consider in setting the alimony obligation are:

- (A) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (B) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earning capacity to a reasonable level;
- (C) The duration of the marriage;
- (D) The age and mental condition of each party;
- (E) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (F) The extent to which it would be undesirable for a party to seek employment outside the home because such party will be custodian of a minor child of the marriage;
- (G) The separate assets of each party, both real and personal, tangible and intangible;
- (H) The provisions made with regard to the marital property as defined in § 36-4-121;
- (I) The standard of living of the parties established during the marriage;
- (J) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
- (K) The relative fault of the parties in cases where the court, in its discretion, deems it appropriate to do so; and
- (L) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

One of the factors to be considered is the distribution of marital property, Tenn. Code Ann. § 36-5-101(d)(1)(H), and Mr. Hill relies on the distribution herein as an important consideration in assessing Mrs. Hill's need. Mr. Hill has provided a Tenn. Ct. App. R. 7 table reflecting the trial court's distribution of property, and Mrs. Hill has not disputed the accuracy of that table or submitted one of her own. According to that table, the trial court divided equally the proceeds from the sale of the marital home, a bank account, some insurance proceeds, a pre-paid funeral benefit, and an IRA. These distributions totaled approximately \$131,000 for each party. In addition, Mrs. Hill was awarded the burial plots, an insurance policy on her life, and the household furnishings.

The most significant award, however, for purposes of Mrs. Hill's future need, was the trial court's order awarding Mrs. Hill one-half of Mr. Hill's monthly pension payments. Each of them will receive \$1,964.82 per month. In addition to this income, Mrs. Hill receives social security in the amount of \$546 per month. Thus, her income without alimony is approximately \$2,510 per month, without consideration of any income which might be produced by the assets she was awarded as marital property.

Mr. Hill will receive an equal amount from his pension plan, \$1,964.82 monthly, and receives \$1,199 per month in social security, for a total monthly income of approximately \$3,164. Once the alimony is deducted from his income and added to Mrs. Hill's, his net monthly income is \$2,664 and hers is \$3,010. Mr. Hill argues that this is inequitable and that he will be in a worse financial situation because of the alimony. He asserts that the alimony award is, therefore, punitive, and that he was not at fault for the breakup of the marriage.

"There is no absolute formula for determining the amount of alimony." *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn. 1995). There are no hard and fast rules for spousal support decisions. *Anderton v. Anderton*, 988 S.W.2d 675, 682 (Tenn. Ct. App. 1998). Initial decisions regarding the entitlement to spousal support, as well as the amount and duration of spousal support, hinge on the unique facts of each case and require a careful balancing of all relevant factors. *Robertson v. Robertson*, 76 S.W.3d 337, 338 (Tenn. Ct. App. 2002); *Watters v. Watters*, 22 S.W.3d 817, 821 (Tenn. Ct. App. 1999). Among these factors, the two considered to be the most important are the disadvantaged spouse's need and the obligor spouse's ability to pay. *Bogan v. Bogan*, 60 S.W.3d 721, 730 (Tenn. 2001); *Robertson*, 76 S.W.3d at 342; *Manis v. Manis*, 49 S.W.3d 295, 304 (Tenn. Ct. App. 2001). Of these two factors, the disadvantaged spouse's need is the threshold consideration and the "single most important factor." *Aaron*, 909 S.W.2d at 410 (quoting *Cranford v. Cranford*, 772 S.W.2d 48, 50 (Tenn. Ct. App. 1989)).

Trial courts have broad discretion to determine whether spousal support is needed and, if so, its nature, amount and duration. *Burlew v. Burlew*, 40 S.W.3d 465, 470 (Tenn. 2001). Appellate courts are generally disinclined to second-guess a trial court's spousal support decision unless it is not supported by the evidence or is contrary to public policies reflected in the applicable statutes. *Bogan*, 60 S.W.3d at 733; *Kinard v. Kinard*, 986 S.W.2d 220, 293 (Tenn. Ct. App. 1998); *Brown v. Brown*, 913 S.W.2d 163, 169 (Tenn. Ct. App. 1994). Our role is to determine whether the award reflects a proper application of the relevant legal principles and that it is not clearly unreasonable.

Bogan, 60 S.W.3d at 733. When the trial court has set forth its factual findings in the record, we will presume the correctness of those findings so long as the evidence does not preponderate against them. Tenn. R. App. P. 13(d); *Bogan*, 60 S.W.2d at 733; *Crabtree v. Crabtree*, 16 S.W.3d 356, 360 (Tenn. 2000).

Mrs. Hill's Income and Expense Statement reflected monthly expenses of \$2,582. Mr. Hill questions some of the expenses. For example, Mrs. Hill claimed \$112 for car operation although she does not own a car and is not allowed to drive by her doctors. In addition, she claimed \$550 for transportation expenses. For her regular trips to doctors, church, the grocery store, other shopping, and the beauty shop, Mrs. Hill testified she relies on her daughter, who is not always able to drive, friends, and taxis. She also claimed veterinary expenses of \$100 per month even though she does not own a pet. She testified these expenses were for care of her daughter's dog. Even including those questioned expenses, Mrs. Hill's monthly expenses totaled \$2,582.

Mrs. Hill's testimony indicated she will incur housing expenses not listed on her expense statement after the sale of her home. Although the testimony regarding Mrs. Hill's estimated rental costs are not precise, Mr. Hill had listed his rent expenses as \$537 per month. In addition, according to testimony from both Mr. and Mrs. Hill, she will no longer be covered by Mr. Hill's health insurance. She testified she is covered by Medicare and can get Medicare supplemental insurance for \$85 per month. The testimony indicates that at some point in time she will need to enter an assisted living facility.

The trial court made no findings of fact related to Mrs. Hill's need or to the court's award of alimony. Although the alimony awarded, along with Mrs. Hill's other income, is greater than the expenses she actually claimed and had been spending, there is evidence she will incur other expenses not listed on the statement. Although the proof on the amounts of those additional expenses is far from clear, the fact that they exist was established. Among the factors which the legislature has determined should be considered in awarding spousal support are the duration of the marriage; the relative financial resources of each party, including separate assets of each;⁴ each party's ability to secure training to improve earning capacity; and the age, mental and physical condition of each party. Applying those factors to the situation of Mr. and Mrs. Hill, we cannot conclude that the trial court's award of \$500 per month in alimony reflects an improper application of applicable principles or is clearly unreasonable.

⁴The trial court awarded Mr. Hill, as his separate property, two accounts which represented money he had inherited and which totaled approximately \$65,000.

III. Conclusion

We affirm the judgment of the trial court. Costs on appeal are taxed to Mr. Hill.

PATRICIA J. COTTRELL, JUDGE